

House Bill 09-1276

**COLORADO'S
FORECLOSURE
DEFERMENT
PROGRAM**

Provided for Housing Counselors by The
Colorado Department of Local Affairs-Division
of Housing

HB 1276

- Signed by Governor Ritter on June 2, 2009
- Becomes effective 60 days AFTER Governor's signature – **August 1, 2009**

- Program provides an **OPPORTUNITY** for deferment of the **FORECLOSURE SALE** if all requirements and deadlines are met – **NOT** a guaranty of deferment

Eligible vs. Qualified

Certain criteria related to the property, the loan and borrower's intentions to be
“eligible”

Can be **“qualified”** only if certified by a HUD-approved housing counselor

ELIGIBILITY

- Must be a **1st lien** on the property
- Borrower (grantor under Deed of Trust) **must reside at the property** on the date the Notice of Election and Demand (NED) is filed
- Borrower **must occupy the property as his primary residence** as of the NED filing date
- Borrower must have occupied the property as his primary residence within 90 days after the date of the Deed of Trust
- Borrower **must intend to continue to reside** at the property
- Borrower **must be personally obligated on the debt**, which was **incurred for personal, family or household purposes**, and
- ORIGINAL Deed of Trust principal amount of **\$500,000 or less**.

POSTING OF ELIGIBLE PROPERTY

- Posting should be done **ONLY** on eligible properties
- The holder (lender) or attorney for holder shall post (or have posted) the Notice (approved DOH form) in a “conspicuous place on the property” – if possible and accessible on the front door of the residence but if not possible at an alternative conspicuous location such as a guard gate or similar impediment
- Notice posting **MUST** be done no later than 15 calendar days following filing with Public Trustee of “complete and accurate” documents and a **determination** by the Public Trustee that the filing is complete per 38-38-102(1)
- **NOT** calculated by date of recording of Notice of Election and Demand for foreclosure (NED).

CONTENT OF POSTED NOTICE

- Description of foreclosure deferment opportunity and procedures an eligible borrower may follow to seek a foreclosure deferment
- Phone number of Colorado Foreclosure Hotline and HUD website address identifying approved housing counselor agencies in Colorado
- Date notice was posted and the **DEADLINE BY WHICH ELIGIBLE BORROWER NEEDS TO CONTACT FORECLOSURE COUNSELOR**
- Notice shall be in both English and Spanish on a single piece of paper, in at least 14-point bold-faced type – form is designed with English on one side and Spanish on the other side – contains pertinent information such as property address and the name of the borrower(s).

How Does Public Trustee Know of Eligibility?

- **IF the property** is considered by Holder (or attorney) to be **eligible for deferment**, the Public Trustee will receive a **separate document** from Holder or Holder's Attorney at time of initial filing of foreclosure documents with PT.
- PT will “**mark**” **foreclosure file as potentially eligible for deferment** and will **calculate WHEN affidavit of posting is due** from Holder (or attorney).
- If separate document is **NOT** filed at time of foreclosure filing with PT, and Holder **LATER DETERMINES** that the property may be eligible and does require posting, Holder (or attorney) shall request PT to re-record NED and pay a \$75 fee to PT. Thereafter all deadlines for deferment and foreclosure shall be determined as though foreclosure was commenced on date of re-recorded NED.

Affidavit of Posting of Notice

- Affidavit of Posting of deferment Notice to be provided to PT **no later than 20 calendar days** after filing of the foreclosure documents and determination of complete and accurate by PT.
- PT shall **NOT** begin newspaper publications or send 2nd combined notice mailing *unless* Holder (or attorney) has provided Affidavit of Posting.
- If **Affidavit is NOT provided** to PT within 20-day period, foreclosure sale date shall be CONTINUED per 38-38-103(5)(d):
 - PT shall notify Holder (or attorney), in writing, that Affidavit of Posting was not provided and indicate that publications shall **NOT BE MADE** until Affidavit of Posting is provided. Notification provided **ONLY** one time.
 - After notification and until required Affidavit of Posting is provided, PT shall **continue the sale** per 38-38-109 an **ADDITIONAL WEEK** for each week that Holder (or attorney) fails to provide the required Affidavit of Posting.

If NOTICE is Not Posted:

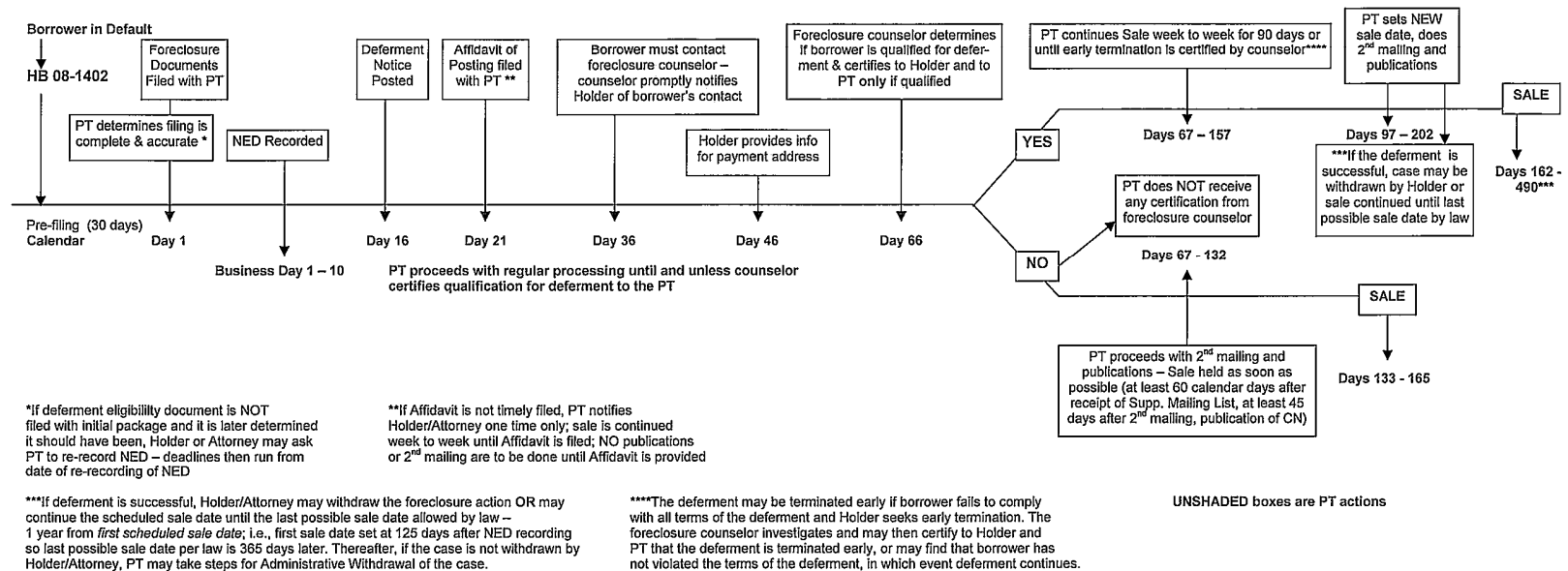
- If Holder (or attorney) fails to timely post the Notice of deferment opportunity on an eligible property, the eligible Borrower shall have 20 calendar days after date of ACTUAL posting to contact foreclosure counselor.
- Holder is responsible for all fees incurred between posting deadline and 20 calendar days after date of actual posting of Notice.
- Interest for period between deadline for posting of Notice and date of actual posting shall be allowed ONLY at the REGULAR RATE and NOT at the default rate as may be specified in the deed of trust.

FORECLOSURE COUNSELORS

- Defined as a housing counselor employed by an Agency approved by the US Department of Housing and Urban Development
- Includes housing counselors affiliated with the Colorado Foreclosure Hotline and The Hope Now Alliance or its successor organization
- The terms “foreclosure counselor” and “housing counselor” are used synonymously in this presentation
- New forms designed for use by Housing Counselors for HB 1276:
 - Certificate that Borrower(s) is NOT Qualified for Foreclosure Deferment
 - Certificate of Qualification for Foreclosure Deferment

FORECLOSURE DEFERMENT TIMELINE

FORECLOSURE DEFERMENT TIMELINE – applies ONLY* to foreclosure cases when a “separate document” is sent with initial filing indicating case is “eligible” for deferment



IMPORTANT NOTE: A deferment eligibility document will be filed with the initial package to the PT ONLY if the holder/holder's attorney has determined that the borrower and the property are ELIGIBLE for deferment consideration. The PT will NOT receive the eligibility document required by 38-38-101(1)(g) if the holder/attorney has determined that the borrower and property are NOT ELIGIBLE for the deferment program. If an eligibility document is NOT received by the PT, the foreclosure will be processed as usual.

Disclaimer: The date calculations shown in this document are "potential" date ranges showing when certain actions may occur. If any parties take action or complete action on a stage of the process earlier than their last possible deadline, the date calculations in this document will CHANGE.

DEADLINES

- Eligible BORROWER must contact Housing Counselor **no later than 20 days after posting of the Notice** – initial contact may take place by *phone, electronically or in person*
- Holder or its attorney must file an Affidavit of Posting with the Public Trustee **no later than 20 days after filing** of “complete and accurate” documents to begin the foreclosure – NOT always the same date as recording of the NED
- HOUSING COUNSELOR shall ***promptly*** notify Holder that Borrower has made contact and shall specify date of contact
- Within **10 calendar days after receiving notice of Borrower’s contact** from Counselor, Holder shall notify Counselor and eligible Borrower *in writing* of address to which payments shall be sent if Borrower QUALIFIES for deferment, and info on how payments can be made electronically.

HOUSING COUNSELOR DEADLINE

- **No later than 30 calendar days after Borrower's initial contact, HOUSING COUNSELOR shall:**
 - Determine if Borrower is or is not QUALIFIED for foreclosure deferment;
 - Certify NOT QUALIFIED determination to eligible Borrower and Holder only
 - Certify QUALIFICATION determination to eligible Borrower, Holder AND to the Public Trustee where the property is located

HOUSING COUNSELOR DUTIES

Determine qualification by calculating whether, considering:

- Eligible Borrower's household expenses and gross monthly income
- The nature of the loan
- Any written loan modification agreement between eligible Borrower and Holder entered into during preceding 12 months, and
- Any other relevant factors,

there is a reasonable likelihood that Holder and eligible Borrower can achieve a mutually acceptable agreement to avoid foreclosure.

COUNSELOR TO USE ANALYTICAL TOOLS DESIGNED TO INDICATE:

- What eligible Borrower is able to pay in monthly housing expenses, including PITI and applicable HOA dues on a “sustainable basis” and
- Whether Holder would likely receive greater revenue from the modification necessary to achieve such a monthly payment for Borrower than Holder would likely receive from a completed foreclosure.

Analytical tools used shall be consistent with “net present value test” set out in FDIC’s Loan Modification Program Guidelines effective October 2008, or any successor program.

BORROWER SHALL NOT QUALIFY if:

- Eligible Borrower **has ABANDONED** the property;
- Borrower **provided *materially false* information** to obtain credit – fact that the debt obligation reflects a stated-income loan is **NOT** sufficient to establish that Borrower submitted *materially false* information;
- Borrower ***has engaged in gross waste of the property***, has been ***cited for major code violations***, or has ***used the property for illegal purposes***;
- Borrower **is currently in bankruptcy proceeding** in which subject property is part of the bankruptcy estate or within the preceding 24 months *has been discharged from a Chapter 7 bankruptcy* in which subject property was part of bankruptcy estate;
- Within immediately preceding 24 months, Borrower **has been discharged from a Chapter 13 bankruptcy** with a Loan Mod Agreement for which subject property is the security; or
- Borrower **has already had a foreclosure deferment on the same debt obligation**, including any **modification of the debt**.

What Happens During the Deferment?

- If the Housing Counselor determines that the eligible Borrower is QUALIFIED and **gives notice** of that fact, the Holder and Borrower SHALL negotiate the terms of the debt obligation, subject to the terms of the debt and applicable government-supported enterprise servicing guidelines.
- Once Public Trustee receives Certificate of Qualification from Housing Counselor, Public Trustee will begin continuing FORECLOSURE SALE DATE **week to week for up to 90 days** (or next scheduled sale date after 90 days); will cancel newspaper publications (or not start publications) and NOT send 2nd combined notice mailing – foreclosure will be “*on hold*” during time of deferment or until deferment is terminated early.

What Happens During the Deferment?

INFORMATION FOR PUBLIC TRUSTEES

- PT foreclosure management system should keep track of deadlines for receipt of Affidavit of Posting on “eligible” properties (when PT receives separate document with initial foreclosure filing) and expiration of 90-day foreclosure deferment period.
- **If** Borrower files a Notice of Intent to Cure during the time foreclosure is qualified and IN DEFERMENT period, and Holder (or attorney) fails to provide timely cure figures to the Public Trustee upon request, the Public Trustee may continue the foreclosure sale date according to *existing law*.
- Any continuance due to lack of cure figures shall run **CONCURRENTLY** with the continuances made due to the foreclosure deferment – there will NOT be “double” continuances.

What Happens During the Deferment?

- During foreclosure deferment, **Borrower SHALL make monthly loan payments** (to whomever designated by Holder) equal to **66.667%** of their **monthly payment due PRIOR to the delinquency**, less the monthly portion that represents taxes & insurance – *unless* Borrower has an obligation to make monthly tax & insurance payments to Holder, then 1/12th of the annual tax & insurance amounts prior to delinquency shall also be paid.
- **1st payment due** to address provided by Holder by the 5th day following date of Housing Counselor's certificate of qualification.
- **Subsequent payments due every 30 calendar days** thereafter until conclusion of foreclosure deferment.

What Happens During the Deferment?

- **To preserve evidence of date of payments**, Borrower may make payments *electronically* or by *certified funds* delivered by a method that provides *evidence of date of payment*.
- Acceptance of payments by Holder during deferment **shall not constitute** a waiver of default or modification of amounts due on original debt or any other of Holder's rights.
- **Payments shall be applied by Holder** pursuant to provisions of the note and deed of trust; if no such provisions, payments applied in following order:
 - Payment of Holder's foreclosure costs and expenses
 - Payment for preservation of property
 - Escrow advances or shortages
 - Late charges and interest, and
 - Principal.

Early Termination of Deferment

- Deferment shall terminate early **upon certification from Housing Counselor to Public Trustee** – recommend copy be provided to Borrower and Holder/Holder's attorney.
- If Holder seeks early termination, it shall *demonstrate to Counselor that adequate grounds exist for early termination*.
- Housing Counselor SHALL make determination **within 10 calendar days** after Holder's request and SHALL issue a Certification of Early Termination if he/she determines:
 - Borrower has abandoned the property;
 - Borrower has failed to comply with conditions of the deferment, including failure to make payments on time and in accordance with this law;
 - Borrower has conveyed, transferred or further encumbered the property in violation of the deed of trust
 - A foreclosure has been initiated by a DIFFERENT party on another lien encumbering the property; or
 - Borrower has filed Bankruptcy during the foreclosure deferment.

Early Termination of Deferment or Expiration of 90-Day Deferment

- If Public Trustee receives **Certification of Early Termination**, PT will collect from Holder (or its attorney) a fee of \$75 and then begin newspaper publications; PT will send the 2nd combined notice mailing ASAP and no more than 20 calendar days after early termination of deferment.
- **If 90-day deferment expires or ends**, PT will collect \$75 fee, begin newspaper publications and send 2nd combined notice mailing ASAP and no more than 20 calendar days after end of deferment period.
- There is **NO requirement** in law that the foreclosure be WITHDRAWN after 90-day deferment period ends – even if a Loan Modification or other arrangement on the debt is made between Borrower and Holder.

WHAT HAPPENS IF AGREEMENT or LOAN MODIFICATION IS MADE BUT THE FORECLOSURE IS NOT WITHDRAWN?

- The Holder MAY elect to not withdraw the foreclosure case after the 90-day deferment EVEN IF an agreement/loan modification is made between it and Borrower regarding remedy of the default on the debt. Some Holders may choose to not withdraw the foreclosure action right away in order to “keep the Borrower’s feet to the fire” to make sure the agreement is fulfilled for a period of time. Sale date will be continued by PT for lack of Bid or OAS, or as requested by Holder (or attorney).
- Housing Counselors and the Public Trustee MAY get inquiries from Borrowers who think their foreclosure case will immediately stop if an agreement or loan modification is made.
- The “last date of sale” permitted by existing law for the foreclosure action will still apply – sale must be held NO “later than 12 months from the originally designated date in the combined notice” unless bankruptcy is filed by the Borrower.
- Foreclosure action may be subject to “administrative withdrawal” by Public Trustee if sale is NOT held by “last date of sale” permitted by law.

FORECLOSURE COUNSELOR IMMUNITY

“A foreclosure counselor acting in good faith shall NOT be liable to ANY PERSON for approving or failing to approve a Borrower for a foreclosure deferment or for certifying or declining to certify an early termination.”

CRS 38-38-806

Sunset Provisions of Act

House Bill 09-1276 created a new Part 8 in Title 38, Article 38 of the Colorado Revised Statutes.

The foreclosure deferment program in HB 1276 is currently scheduled to “sunset” – no longer be effective law – as of June 30, 2011.

The State Legislature may, at some later date by passage of another Act signed by the Governor, decide to continue the program beyond June 2011 or could eliminate the program earlier than June 2011.

Thank you to Carol Snyder, Public Trustee of Adams County, for providing the initial draft of this presentation.